



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1529 of 1997 (OS)

MARGARET WAMBUI JAVER.....PLAINTIFF

VERSUS

RAHEMETALI MOHAMMED JAVER.....DEFENDANT

R U L I N G

The applicant married the respondent on 22nd November 1969 at the District Commissioner's office in Kajiado and they were blessed with 3 issues of the marriage who are all grown ups. As gathered from the affidavit evidence their marriage has hit the rock.

During the subsistence of the marriage they managed to purchase two properties namely LR. No 93/148 Golden Gate and LR. No. 37/584 plot 120/8 Nairobi West. Although the said properties are owned together, they are registered in the name of the respondent.

On 10th April 2007 she brought this suit by way of Originating Summons seeking orders:-

1. THAT it be declared that the parcel of land known as LR No 93/148 Golden Gate and LR No 37/584 Plot 120/8 Nairobi West are owned jointly and in equal shares by the plaintiff and the defendant or such order as to the ownership thereof as may be just.
2. THAT the said properties be registered in the joint names of the plaintiff and the defendant.
3. THAT the defendant be restrained permanently from seeking, charging leasing or otherwise disposing of the said properties or any interest thereto except with the plaintiff's consent.
4. THAT the defendant should pay costs of this proceedings.

The plaintiff in this suit was represented by M/s Muriu, Munga & Co. Advocates while the defendant was represented by Mohammed Madhan & Co. Advocates.

While the suit was pending the said Advocates for both parties wrote the following letter to the Deputy Registrar on 30th October 1999 as follows:-

The Deputy Registrar

High Court of Kenya

Nairobi

Dear Sir,

HCCC No. 1529 of 1997 (OS) Nairobi

MARGARET WAMBUI JAVER vs. RAHENMENTALI M. JAVER

We refer to the above matter and have the honour to request the following consent orders:-

- 1. That the Defendant Rahemetali Mohamed Javer do transfer his half share in all that property known as LR No 93/148 Golden Gate to the Plaintiff/applicant Margaret Wambui Javer.**
- 2. That the Plaintiff/Applicant hereby relinquishes all her interests and claims of ownership and title whatsoever in perpetuity known as LR No. 37/584 plot 120/8 Nairobi west.**
- 3. No order as to costs.**

Dated the 30th day of October 1999.

Signed

MURIU MUNGAI & COMPANY

ADVOCATES FOR THE PLAINTIFF

Signed

MOHAMED MADHANI & COMPANY

ADVOCATES FOR THE DEFENDANT

The Deputy Registrar upon receipt of the above letter drew a consent order as follows:

ORDER

Upon reading a consent letter Ref: RJ/0135/98/SYD dated 30th October 1999 and filed herein on 4th April 2001 and signed by his Muriu Mungai & Co. Advocates for the Plaintiff and Mohamed Madhani & Co. Advocates for the Defendants.

IT IS ORDERED BY CONSENT

- 1. THAT the Defendant/Respondent Rahamatali Mohamed Javer do transfer Ms half share in all that property known as LR No. 93/148 Golden Gate to the Plaintiff/Applicant Margaret Wambui Javer.**

2. **THAT the Plaintiff/Applicant do relinquish all her interests and claims of ownership and title whatsoever in perpetuity to all that property known as LR No. 37/584 plot No. 120/8 Nairobi West.**

3. **THAT there be no order as to costs.**

GIVEN under my hand and the seal of this court this 13th day of April 2001.

PRINCIPAL DEPUTY REGISTRAR

HIGH COURT OF KENYA AT NAIROBI

On 24th August 2004 the plaintiff brought this Notice of Motion dated 24th August 2004 and filed on 3rd September 2004 seeking orders:-

1. THAT this Honourable court be pleased to grant an order compelling the defendant/respondent herein to execute the Transfer in respect of LR NAIROBI/BLOCK 93/148 in favour of the Plaintiff/Applicant herein within 14 days from the date of the order to enable the transfer of the aforesaid property to the applicant herein in terms of a court order issued on 25th day of June 2001.
2. THAT in the alternative leave be granted to the Chief Land Registrar Nairobi and/or any other appropriate officer as the court may so designate to execute the said transfer documents in respect of the said property.
3. THAT costs be provided for.

The application is based on ground that by a consent order issued by this Honourable Court on 25th June 2001 it was ordered inter alia that the defendant/respondent do transfer half his share in ALL THAT property known as NAIROBI/BLOCK LR No 93/148 GOLGEN GATE to the Plaintiff/Applicant. The application is also supported by an affidavit sworn by Margaret Wambui Javer in which she avers that she is informed by her advocates on record which information she verily believes to be true, that they forwarded a copy of the said draft transfer of lease to the defendant/respondent's advocates on record being Mohammed & Co. Advocates for onward transmission to the defendant for execution but the defendant/respondent declined, refused and/or neglected to execute the said document.

A casual look at the said draft transfer of lease annexed herein show that what is sought to be transferred is the whole of suit property LR No 93/148 as sought in prayer 1 of this Notice of Motion.

This does not conform with the consent order which ordered the defendant to transfer only half share of suit land. I am unable to grant the orders sought on the following grounds.

- (1) The order sought in prayer 1 of this Notice of Motion seeks the court to compel the defendant to execute the Transfer in respect to NAIROBI/BLOCK 93/148 in favour of the plaintiff. This does not tally with the consent order which referred only to the defendant's half share of the suit property.
- (2) The suit property comprises of a building (house). There is no way the court can order the transfer of half share of a house. In such circumstances the best the plaintiff can do is to seek a declaration that the suit property is owned by both of them jointly in equal shares and the same be registered in both the name of the plaintiff and the defendant jointly in equal share. In the alternative they can cause the property to be valued sold and share the proceeds equally.
- (3) The letter of consent dated 30th October 1999 addressed to the Deputy Registrar but interestingly filed about 1½ years later was signed by advocates. Since the agreement between the parties involves transfer of an interest in land the same ought to have been signed by the parties themselves and their signatories attested.

Accordingly the plaintiff's Notice of Motion dated 24th August 2004 and filed in court on 3rd September 2004 is dismissed with no order as to costs.

Dated and delivered at Nairobi this 16th day of May 2008.

J. L. A. OSIEMO

JUDGE